1949. K **File No.** O.B.Cs.Rs/49

K

Legal DEPARTMENT

A BRANCH

Subject:— Opinions under the Bombay Civil Services Rules

P=25
K

File No. O.B.Cs.Rs./49

Std. Sectt. Slip 24 B e.

91-A

CONTENTS

Legal Department File No. 8 B.S.C. Rs. 1949.

1949

Serial No.	Compilation No	Subject	Pages.
1	2	3	4
1	O B.S.C. Rs,/49. On. No,19confl 10-1-1949	Opinion under Rule the B.S.C.S Rules. Govt. appeafrs to be the final authority for pparposes and dismissal removal and suspension of Government in foreign service.	1-3-
2.	On. No. 166confl 11-3-1949.	Resignation of Mr. Shaikh of option to serve Pakistan.	5
3.	On No 131.Confl 26/2/1949	Question of supplying a copy of report in Departmental enquiry (C.S.-C.C.&A.)Rules. Rule 55.	7-9-11
4.	On No 2317 26-2-49	Whether the expressions "to serve his Majestty in India " and "His Majesty's service"in the agreement of Mr. Battiwala should still be adopted or whether these should now be changed to "Serve Government in the Indian Union" in view of the fact that hexis a direct recruit to B.S.C. class I	13-14
5.	On No.4739 30-4-1949	Forfeiture of salary for broken period where one month's notice not given - Mr. Narayanrao's failure to serve .-	15

DDP 15-4-51 SDR 13/4/51

1	2	3	4
6.	Cn.10733 24-9-1949	acuittal of rules Sub Inspector T.C. Anand charge of assault should not be confered with the charge of misconduct.-	15
7.	R.H No.1953. 25-11-1949 Cn No 13624 28-11-1949	In the absense of written agreement Govt.can insist on a reasonable notice to enable to obtain a similar Govt servant.	19-21 17-19
8.	Cn No 726 conf1 23-11-1949	Whether the certificate under clause (a) of rule 288 B.C.S. Rule which declers a main completely and permanently incapacitated for further services and which he belongs can be said to be a certificate of partial incapacity in such an unambiguous manner as to fulfil the requirement of an express provision.	21-23-27
9.	Cn No 15059 24-12-1949	Recruitement of Mr. Thaplunkar from the date of his suspension -full pay for the period of suspension.	25

M.R.D.
9/4/56-

Office of the R.L.A.

Rule 103 of the Bombay Civil Service Rules provides that rules in Chapter VI-Foreign Service apply to those Government servants who are transferred to foreign service after these rules come in to force. Government servants transferred betwee 1st June 1929 and 31st October 1938 will be governed by rules in Chapter VI of the 2nd Edition of the Bombay Civil service Rules(see Rule 104); but for other purposes the rules contained in the 3rd Editio will apply. "Foreign service" as defined by rule 9 (20) in the 2nd Edtion of the Bombay Civil Service Rules which apply in the present case means service in which a Government servant receives his substanti pay with the sanction of Government (a) from any se scurce other than the revenue of the Governor-General in Council or of a province or the Raiway Fund(when established); or (b) from company working a state Railway. Rule 113 lays down certain principles to be observed by Government in sanctioning transfer to foreign service and sub-rule 4 of that rule provides that the foreign Government must agree to the payment of contributions towards leave-salary and pension un der the ordinary rules regulating such contributions. Such contributions are paid by Government servant himself unless the foreign employer consents to pay them(see Rule 119). P.W.D. has not fowarded the ter and conditions on which Mr. Desai was lent to the Ahmedabad Municipality. Presumably in the present ca the Municipality has agreed to pay these contributi as required by the service rules. ~~But for purposes~~

But for purposes of dismissal, removal and suspension of a Government servant in foreign service the Government appears to be the final authority. The P.&S.D. has taken the same view that in such cases the correct course is to revert a Government servant from foreign service and then place him under suspension as the foreign employer is not empowered under the Civil services (Classification, control and Appeal) Rules to take Disciplinary action against him. (Para.2 of Government of India, H.D. letter No. F. 9-47-32-Asto(S), dated 25-1-1933 printed in the preamble to G.R., F.D., No 5153, dated 2-3-1933). Government was not authorised to suspend Mr. Desai before reversion to Government service. His suspension was therefore a technical irregularity as a result of which the Municipality has unnecessarily to be burdened with the liability to pay for his subsistence allowance and leave and pension contributions till he was actually revereted to Government service. It is true that even after his acquittal it was assumed both by Government and the Municipality that he was still in the municipal service and the Administrator's letter of the the 1st December 1942 which asked for his reversion to Government service also supports this assumption. Since his suspension by Government his services were not available to the Municipality and therefore by his suspension his services were impliedly withdrawn from the municipal service and he was thus reverted to Government service. He must be therefore deemed to be in the service of Government during the period of suspension i.e. 17-9-1942 to 18-11-1943 and Government would be liable to pay him the susistence allowance for this period. Under clause (a) of Rule 119 of the Bombay Civil service Rules while a Government servant is in foreign service contributions towards the cost of his pension must be paid to general revenues on his behalf. Clause (b) provides that if the foreign service is in

~~foreign service is in~~ India contributions must be paid on account of the cost of leave salary also. Clause (c) provides that contributions due under ~~clause~~ clauses(a) and (b) shall to paid by the Government servant himself, unless the foreign employer consents to pay them. They shall not be payable during leave taken while in foreign service. This rule is similar to Rule 119 in the 2nd Edition F.D.'s interpretation of this sub-rule is that since no leave is earned during leave period no contributions towards pension or leave are to be made for that period. This interpretation is correct. Since the Municipality had presumably made the contributions for the period during which Mr. Desai was on duty, it cannot be called upon to pay them for the leave period i.e. 19-11-1942 to 5-1-1943.

Sd/-
8/1/
Remembrancer of Legal Affairs.

U.R. to P.W.D., No. 19-confl, dated the 10th January 1949.

M.R.D.
9/4/56.

Office of the R.L.A.

Re.resignation of Mr. Shaikh by opting to serve Pakistan.

The date of Mr. Shaikh's resignation of his service would be the date on which he made his final choice to serve Pakistan or the date of his releif from his duties, whichever was later.

Sd/-
11/3

Remembrancer of Legal Affairs.

U.O. to E.& I.D., No. 186-confl dated the 11th March 194

M.R.D.
9/8/56.

Office of the R.L.A.

Question of supplying a copy of report in Departmental enquiry C.S.(C.C.&A) Rules. Rule 55.

It appears that an Inquiry Committee known as th "Phaltan Inquiry Committee" was constituted to investi gate into the suspicious cases of cane blocks and cane areas in the Phaltan Sub-Division of the Nira Canals Division. That Committee after framing necessary charges against the officers concerned of whom one wa Mr. Tagare called upon them to answer the charges against them and to adduce evidence in support of thei defence. They were given an apportunity to examine t papers and to cross- examine the oral evidence pro- duced against them. After considering all the evidenc produced against each officer, the Committee submi- tted its report to Government on the basis of which Government came to the conclusion in respect of the punishment to be imposed on each of them. When the papers were submitted to the Chief Secretary he point out that:

> "Before a Government servant is dismissed, it i necessary, in accordance with the orders of Gov Government (vide Government of India's letter No.135/45-Ests.dated 24th July 1945), that a co of the Enquiry Officer's report should be su- pplied to the servant concerned and he should called upon within a reasonable time to show cause why he should not be dismissed. This p cedure will therefore have to be followed in present case also.

There is another point. The order of dismissal should be passed by a competent authority and not by Government."

In pursucance of those suggestions, it appears that Government issued a confidential letter to the Superintending Engineer, D.I.C., on 13th March 1948 indicating the penalties to be imposed on the staff one of whom was Mr. Tagare and the procedure to be followed, namely, compliance of rule 34 of the Bombay Civil Services(Conduct, Discipline and Appeal)Rules before imposing the penalties. Accordingly the Superintending Engineer, D.I.C.,issued orders against the officers concerned. The Order against Mr. Tagare is at page 9 of P.W.D. file No 8801/36 part III of 1948. That order runs as follow:-

"Mr. K.G.Tagare, Canal Inspector.

He was found guilty of the following offences by the Phaltan Enquiry Committe:

... ...

In reply he states that the irregularities ascribed to him are not acceptable to him and his replies to various points are as under:-

... ...

"ORDER: The superintending Engineer, Deccan Irrigation Circle agrees with the findings of the phaltan Enquiry Committee and orders that as the replies to the charges framed are not satisfactory Mr.K.G. Tagare be dismissed from Government service and pension forfeited."

It is apparent from the order passed by Superintending Engineer that as suggested by the chief Secretary, Mr.Tagare was not at all called upon to explain why the punishment proposed to be inflicted on him should not be imposed. Consequently the order passed by the Superintending Engineer is opposed to section 240(3) of the Government

of the Government of India Act, 1935(see 50 Com.L.R., P.649 and Government of India's instructions contains in their letter No. 135 /45-Estt. dated 24th July1945) Since Mr. Tagare has already been dismissed from service, it is very difficult at this stage to regularise the postion unless fresh notice is given to him. However that may be, there is no reason why the relevant portion of the Phaltan Enquiry Committee's report should not be supplied to Mr. Tagare. That report was made after the necessary charges were framed and evidence recorded. It is on the basis of this report that an action was proposed against these officers and in due course they should have been called upon to explain why the punishment proposed should not be imposed on them. As pointed out by Government of India inthe in the aforesaid letter, it is necessary that an officer against whom a departmental enquiry is held should be supplied with a copy of the report. Mr. Tagare will therefore have to be supplied with a copy of such portions of the Phaltan Enquiry Committee's report as pertain to him.

Sd/-
P/42

Remembrancer of Legal Affairs.

U.R. to P.W.D., No. 131 confl dated the 26th February 1949.

M.E.D.
9/4/86.

REMARKS OF the R.L.A.

The following two points are raised for Remembrancer of Legal Affairs's consideration with reference to the agreement to be entered into with Government under Rule) of the B.C.S.C. & R.-Rules by Provincial Service (Class I) Officers:-

(i) Whether the expressions"To serve His Majesty in India" and "His Majesty's service" occuring in the agreement should still be adopted or whether these should now be changed to serve "the Government in the Indian Union" and "in rhe service of the Government of Bombay" respectively as has been done By Mr. Nagarwala in respect of his agreement.

(ii) Whether the proposed omission of lines 5 to 8 in the agreement of Mr. Battiwala in view of the fact that he is a direct recruit to the B.S.E. Class I, is in o order.

QUESTION NO.1.- It is not necessary to make any amendment in the expressions" to serve His Majesty in India" or His Majesty's service" occuring in the agreement as the Indian Independence Act, 1947 has not dissolved completely the tie with the Crown and the persons whoare in civil service or who hold civil posts in the Indian Union are still in the service of His Majesty (see sections 240 and 241(2) of the Government of India Act, 1935) (Please see L.D., U.R. to E. and I.D. Department No. 4806 dated 30-4-1948)

QUESTION NO.2. . It is proposed to omit the following:-

"Whereas the covenantor had been in the service of the Government of Bombay(hereinafter referred to as the Government) as an officer of the Bombay service of Engineers till the day of 19.

This omission will be necessary as the covenantor was not in service before 30-3-1944. on which date he appears to have been directly recruited to class I service .

Sd/-
26/2

Remembrancer of Legal Affairs.

U.R. to P.& S.D.,No2317 dated ~~26th~~ 26/2/1949.

M.R.D.
9/4/56.

Office of the R.L.A.

There would be no legal objection to forfeiting

Forfeiture of salary for broken period where one month's notice not given
R.L.A.'s. opinion No. 59,61, dated 24.8.46.

the salary of Rs. 6-15-0 due for the broken period ; but the claim for a month's pay in lieu of notice need not be pressed unless Government actually suffered damages by reason of Mr. Kanapathipillai's failure to serve (see R.L.A' opinion No. 6861 dated 24.8.1946)

Sd/-
30/4

Remembrancer of Legal Affairs.

U.R. to P.W.D. No 4732 dated the 30th April, 1949.

M.R.D.
9/4/56

Office of the R.L.A.

Acquittal of Sub-Inspector, T.C. Anand.

The charge of assault for which Mr, Anand was prosecuted should not be confused with the charge of misconduct for which a departmental enquiry was held against him. Admittedly Mr. Anand was acquitted of the former charge and the Judgment of the presidency Magistrate discloses that Mr. Anand was acuitted not because he was given the benefit of doubt but because there was no reliable independent and corroborative evidence. Such acquittal can be considered "honourable"

M.R.D
9/4/56

Sd/-
21/9

Remembrancer of Legal Affairs.

U.O. to H.D. No. 10733 Dated the 24th September 1949.

R.I.NO. 19232
26-11-49

By G.R.P.W.D. No. 7025/25 dated the 11th June 1949 the Governor of Bombay appointed Mr. A.V. Subramanium as an Asstt. Engr.(Electl Mech.) on pay of Rs 250-20-750 He was appointed on contract basis for a period of 5 years subject to termination by 6 months' notice on either side or earlier as provided in the agreement. The appointment is further subject to his passing the medical examination of physical fitness. Provisions of rule 4 of the B.C.S.C. and R. Rules were relaxed in his case. He was to be under the administrative control of the Electrical Commr. who was asked to obtain an agreement on stamped paper from him. Mr. Subramanium joined his duties with effect from 11-6-49 and seems to have tendered his resignation on account of house-hold difficulties and had requested that he may be relieved on 12-11-49. The Electrical Commr. states that Mr. S. claims that as he has not yet executed the agreement he is not bound to give 6 mpnths notice. Secy. P.W.D. is of the view that the agreement not having been executed all implications have only moral value and there can obviously be no legal bindings. The R.L.A. is requested to advise in the matter.

2. Mr. Subramanium was appointed by Govt. to the post of Asstt. Engr.(Electrical and Mechanical) on a contract basis for a period of five years in the first instance subject to termination by six months' notice on either side or earlier as provided in the agreement.

——When he joined his duties on 11-6-49 presumably he accepted these and other condtions stated in P.W.D.G.R. No. 7025/36, dated 11-6-1949. No agreement seems to have taken from him so far. Since no agreement is executed the period of notice on either side would be six months. The fact that no agreement has been executed would not absolve him from giving notice before he resigns his post. Legally therefore he is bound to give six months' notice as provided in the condtions of his appointment. The view taken by the Secy.P.W.D. in his note dated 16-11-49 is not correct.

Sd/-
24/11.

A C R Reply may be :-

The view ~~of~~ taken by Secy P.W.D. is correct. However according to general law Govt. can, even in the absence of a written agreement, insist on a reasonable notice to enable Govt. to obtain a similar servant; and such notice must be reasonable from the point of view of ~~notice~~ both Govt. and Mr. Subramanium. (see Sarkar's master and servant ~~Pt~~ P P 219, 220) Ordinarily a months notice would be sufficient.

Sd/-
25/11

Sd/-
25/11

H.R.D
9/14 GI

U.R. to P.W.D. No. 13624 and 28-11-1949.

Office of the R.L.A.

The view taken by Secretary, P.W.D. is correct. However according to general law Government can, even in the absence of a written agreement, insist on a reasonable notice to enable Government to obtain a similar servant; and such notice must be reasonable from the point of view of both Government and Mr. Subramanium. (see Sarkar's Master and servant PP. 219,220) Ordinarily a month's notice would be sufficient.

Sd/-
26/11

Remembrancer of Legal Affairs.

U.R. to P.W.D. No. 13624 dated the 28th November 1949.

M.R.D.
10/4/56.

Ulrige of the M.L.A.

Under rule 288(a) of the Bombay Civil Services Rules, except as provided in clause(b) of this rule, the invalid pensions of all Government servants subject to these rules are regulated by the scales prescribed by rule 282. The scales prescribed under rule 282 are subject to these limitations, i.e. "unless in any case it be otherwise expressly provided by or under these rules". The note to rule 288, which is the only other relevant rule, in its turn makes reference to rule 201(c). The scales prescribed under rule 282 will, therefore, prevail unless there is an express provision otherwise made in rule 201(c). Turning to rule 201, we find that two forms of certificates are provided, one under clause(a) and another under clause (b). The first certificate can itself be of two kinds, i.e. (1) where a person is declared to be completely and permanently incapacitated for further service of any kind, or (2) is declared for further service in the Department to which he belongs. The certificate under clause (b) declares a person fit with or without further rest for service of a less laborious character than that which he has been performing. Clause(c) of rule 201 then goes on to say as follows: "The object of the certificate prescribed under clause(a) to the effect that the Government servant is completely and permanently incapacitated for further service in the Department

~~Department to which~~ he belongs or of the alternative certificate (of partial incapacity) in the foregoing clause is that a Government servant should, if possible be employed even on lower pay, so that the expense of pensioning him may be avoided. If there be no means of employing him even on lower pay, then he may be admitted to pension, but it should be considered whether, in view of his capacity for partially earning a living, it is necessary to grant to him the full pension admissible under the rule". Clause (c) thus contemplates that it is only where the certificate is of the person's partial incapacity, it would be permissible to reduce his pension. The question, therefore, which falls for consideration is whether the certificate under clause (a) which declares a man completely and permanently incapacitated for further service in the Department to which he belongs can be said to be a certificate of partial incapacity in such an unambiguous manner as to fulfil the requirement of an express provision.

2. The position is not free from doubt. In the first place the opening part of clause(c) speaks of a certificate prescribed under clause(a) without making any further distinction between the two different kinds of certificats which are permissible under clause(a). It would be rather far fetched to hold that a person who is declared as incapacitated for further service in the Department towhich he belongs is thereby presumed to have been declared fit for service in other Departments or is declared partially incapacitated only. A plain reading of the two kinds of certificates given in clauses(a) and (b) would show that by the alternative certificate of partial incapacity referred to in clause(c) is meant the certificate under clause(b) and not also the certificate under clause(a) which declares a person incapacitated for further service in the Department to which he belongs.

The alternatives are mentioned in clause(c) itself in that particular manner.

3. I am therefore, inclined to endorse Mr. Suryavanshi's contention that the provision in the concluding part of clause(c) would not be applicable to him, and that consequently he will be entitled to pension at the rates prescribed in rule 282.

Sd/-
23/11

Remembrancer of Legal Affairs.

U.R. to H.& L.G.D. No. 726 Confl. dated the 23rd November 1949.

M.120-
10141

Office of the R.L.A.

The Court will not care to go behind the Government order. In view of the unequivocal statement that Mr. Chiplunkar should be reinstated from the date of his suspension, the Court might be inclined to hold that it was Govt's intention to give him full pay for the period of suspension. This threatened litigation may therefore be avoided by admitting the claim which is small. No larger question of principle is involved.

Sd/-
23/12

Remembrancer of Legal Affairs.

U.R. to H.D. No. 15059 dated the 24th December 1949

M.R.D.
10/4/56.
Sure 13/4 Drf 13-4-56